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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

PAUL E. CLEU, *Petitioner,*

v.

O'CONNOR HOSPITAL, INC., *CALIFORNIA COURT OF APPEAL FOR THE SIXTH DISTRICT, Respondents,*

PETITION FOR A WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL FOR THE SIXTH DISTRICT

PHILLIP J. GRIEGO
111 W. St. John St.,
Suite 404
San Jose, CA 95113
(408) 293-6341

Counsel of Record
for Petitioner

QUESTIONS PRESENTED

Where no doctrinal controversy is involved, does the Free Exercise Clause of the First Amendment immunize a hospital from all liability for breach of an employment contract solely because the hospital is sponsored by a religious order and the employee is hired as the hospital's chaplain?[1]

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[1] Rule 28.1 list of parties: The Superior Court of Calif ornia, County of Santa Clara, was listed in the caption below as a respondent. All other parties are named in the caption for this action.

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TABLE OF AUTHORITIES

Secondary Authorities:

The petitioner Paul E. Cleu respectfully prays that a writ of certiorari issue to review the judgment and opinion of the California Court of Appeal for the Sixth Appellate District, entered October 14, 1987. The California Supreme Court entered its order denying petitioner's request for review December 23, 1987.

OPINIONS BELOW

The opinion of the California Court of Appeal for the Sixth District (Agliano, P.J.) is not reported and is reprinted in the appendix hereto. p. 3a, *infra*.

The California Supreme Court (Lucas, C.J.) ordered that the decision of the Court of Appeal not be published. It is reprinted in the appendix hereto, p. 19a, *infra*.

The memorandum of decision of the California Superior Court for the County of Santa Clara (Rushing, J.), a nominal party below, is not reported and is reprinted in the appendix hereto, p. 1a, *infra*.

JURISDICTION

Petitioner brought this action for wrongful discharge August 14, 1986. Respondent answered asserting an affirmative defense based on the First and Fourteenth Amendments to the U. S. Constitution, alleging that the decision to fire petitioner was faith-based and, therefore, an ecclesiastical decision beyond the subject matter jurisdiction of the court. (Appendix A to petition below, p. 12). The Superior Court denied respondent's motion for summary judgment because there was a question of fact as to whether the reason for petitioner's dismissal was in fact religious-based. (Appendix hereto p. 2a *infra*.)

On respondent's request for writ of mandamus the California Court of Appeal for the Sixth Appellate District on October 14, 1987 entered a judgment and an opinion reversing the Superior Court's order and directing that petitioner's complaint be dismissed on the ground that a trial to determine whether petitioner's dismissal was in fact motivated by religious concerns would interfere with the free exercise of religion of the Order which sponsors the hospital. (Appendix hereto p. 17a, *infra*.)

Petitioner timely requested review by the California Supreme Court. On December 23, 1987 the Supreme Court entered its order

denying petitioner's request and ordering that the opinion below be "decertified." (Appendix hereto p. 19a, *infra.*) Such an order prevents the opinion below from being published and it cannot be cited as precedent. However, it is still the law of the case for purposes of this litigation and the trial court has dismissed this action as ordered by the Court of Appeal. (Appendix hereto p. 27a, *infra.*)

STATUTES INVOLVED

28 U.S.C. Section 1257. *State Courts; appeal; certiorari.*

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specifically set up or claimed under the Constitution, treaties or statutes o f, or commission held or authority exercised under, the United States.

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment VII.

In Suits at Common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved , and no fact tried by a jury, shall be reexamined in any Court of the United States ,

than according to the rules of the common law.

Amendment XIV. (Appendix hereto p. 20a, *infra*.)

STATEMENT OF THE CASE

Paul E. Cleu (hereinafter, Cleu) brought this wrongful termination action after he was discharged from his former position of associate chaplain of O'Connor Hospital (here inafter, Hospital) a public benefit corporation sponsored by the Daughters of Charity of St. Vincent de Paul (hereinafter, Daughters) a religious order of the Catholic Church.

The Hospital voluntarily entered into an employment agreement with Cleu guaranteeing him substantive and proced ural rights. (Appendix hereto p. 4a, 7a, *infra*). The handbook, given to Cleu during the hiring process, expressed "the general personnel practices of O'Connor Hospital," and contained a sweeping commitment to fair treatment of its employees. "It is the goal of the Hospital to provide justice to all employees by being fair, consiste nt, and equitable." (Petition below, Appendix B at 305, 311). A three-ste p discipline system was established: verbal warnings, written warnings and—finally—discharge, the purpose of which was "to protect the employee by giving him an opportunity to respond. . ." (*Id.* Appendix B at 311.)

In January of 1985, Hospital supplemented the employm ent handbook with a "problem coaching" procedure. Its objective was to "preserve the work relationship," if possible, before termination. (*Id.* Appendix B at 320-1.) Cleu's supervisor told him that these procedures applied to him just like any other employee of the hospital. Cleu accepted and continued employme nt on that basis. (*Id.* Appendix B at 295:17-296:16; 320-321). Hospital admittedly terminated Cleu without following its own procedures. (Appendix hereto p. 5a, *infra*).

During his two and one-half year employment with Hospital, Cleu received only one warning, a "verbal counseling" in October 1983. His two annual evaluations, in February 1984 and March 1985, ranked him overall as "very good," and he received salary increases. Hospital never required Cleu to undergo problem coaching. (Petition below, Appendix B at 292:3-9; 293:3-28; 297:3-6).

Shortly before Cleu's second annual evaluation in March 1985, he considered quitting his job with Hospital to accept a different job in southern California. When Cleu's supervisor asked him what it

would take to get him to stay at O'Connor, Cleu replied, "A raise of 20-25 percent." Two weeks later, his supervisor offered him a 20 percent raise. The supervisor told him he was satisfied with Cleu's performance and that he had a "secure future" with O'Connor Hospital. Relying on the new raise, high evaluation, and the promise of job security, Cleu changed his mind and did not pursue the southern California position. (*Id.* at 294:1-21).

Approximately five months later, in August 1985, Cleu's supervisor told him to look for another job. He was discharged two months later. The reason given for the termination—that Cleu allegedly did not get along with some staff—was not among the 12 grounds for discharge listed in the employee handbook. Cleu never received any verbal or written warning or problem coaching concerning alleged deficiencies in this area. Later, Cleu's supervisor told an employment agency that Cleu had no problems getting along with anyone. (*Id.* at 456-458).

Hospital moved for summary judgment on the theory that it was immune from suit by virtue of the Free Exercise Clause of the First Amendment as applied to the states through the Fourteenth Amendment because some of Cleu's responsibilities were religious in nature "in which case the courts have held that a religious issue is always present," (Petition below p. 20 fn. 6).

The trial court denied summary judgment because (1) there was an issue of fact as to whether Cleu was terminated by a religious superior or religious tribunal or hierarchy for religious reasons; (2) although the Hospital is sponsored by a religious order and Cleu was fulfilling a religious role in serving as associate chaplain "[t]his does not establish, . . , that a decision by a private employer to terminate an employee serving in a religious position is an exercise of freedom of religion. This is especially true when an employee of a private employer is terminated for non-religious reasons. There is no evidence that plaintiff was terminated because of his religious beliefs." (Appendix hereto, p. 2a, *infra*); (3) there was also an issue of fact as to whether the Hospital acted in good faith. (Appendix hereto p. 2a, *infra*).

The California Court of Appeal reversed and ordered the trial court to enter judgment for the Hospital. The Appellate Court acknowledged that "[f]or purposes of summary judgment, Father Cleu had here stated the elements of the California tort of wrongful discharge, based on allegations Hospital has violated implied and express prom-

ises not to terminate without good cause nor without first following certain warning procedures which admittedly were not used here." (Appendix hereto p. 7a, *infra*). The Appellate Court also acknowledged that "[h]ospital has not claimed the reasons for discharging Father Cleu stem from doctrinal differences of opinion." (Appendix hereto p. 4a, *infra*). However, it went on to hold that Cleu's status as a priest, "coupled with the primarily religious nature of Father Cleu's duties at Hospital, determine the First Amendment issue. The employer may be either the Church, a Church-run institution, or an affiliated religious employer to invoke the constitutional protection. (See *Corporation of Presiding Bishop v. Amos, supra*, 97 L.Ed.2d 273" (Appendix hereto p. 17a, fn. 5 *infra*). "In making this decision we are cognizant, among other things, of the central fact plaintiff is a priest, who would in the normal course of things look not to the secular authorities but to his Church for employment security." (Appendix hereto p. 17a, *infra*). The court balanced the Daughters' abstract religious freedom against Cleu's contract rights and held that it was inappropriate to inquire into the reasons for the disc harge though no evidence was presented that such an inquiry would materially affect the defendant's beliefs or practice. (Appendix hereto p. 17a, *infra*).

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with decisions of this Court, Circuit Courts of Appeal and state Supreme Courts which have applied neutral principles of law to employment disputes between churches and their employees.

The Appellate Court fashioned a new rule of deference to church authorities that directly conflicts with this Court's holding in *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986). In *Ohio* a teacher for the Dayton Christian Schools became pregnant and was notified that her contract would not be renewed. The Ohio Civil Rights Commission found probable cause to issue a complaint of sex discrimination against the Dayton Christian Schools. Dayton brought a civil rights action of its own against the Commission to enjoin it from exercising jurisdiction. Dayton contended that

the mere exercise of jurisdiction over it by the state administrative body violated its First Amendment rights. The District Court refused to issue the injunction but the Court of Appeals reversed. This Court sustained the District Court stating:

> the Commission violates no constitutional rights by merely investigating the circumstances of Hoskin's discharge in this case, *if only to ascertain whether the ascribed religious-based reason was in fact the reason for the discharge.* (emphasis added) (91 L. Ed. 2d 512, 522-523).

Although the specific holding concerns whether this Court should abstain from interfering with a state proceeding pursuant to the *Younger-Hoffman* line of cases, the opinion definitely holds that a court may inquire into the reasons for discharging an employee performing an essential part of the religious mission of a religious employer without violating the First Amendment. Although *Ohio* concerned a teacher and not a priest the Appellate Court did not consider this distinction material because "[i]n a real sense, teachers in such schools play a role closely resembling that of priests or ministers; whether from pulpit or lectern, both can potentially enhance or damage the message which the church wishes to communicate." (Appendix hereto p. 13a, *infra*).

In *Jones v. Wolf,* 443 U.S. 595 (1979) this Court reiterated its support for the application of neutral principles to settle disputes between church members over civil and property rights. "We cannot agree, however, that the First Amendment requires the States to adopt a rule of compulsory deference to religious authority in resolving church property disputes, *even where no issue of doctrinal controversy is involved.*" (emphasis added) *Id.* at 605.

> The neutral principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees,* or purchase goods. (*Jones v. Wolf,* 443 U.S. 595 at 606.) (emphasis added.)

Wolf was also followed in the case of *Reardon et al. v. Lemoyne,* 454 A. 2d 428 (N.H. 1982). In that case four nuns employed as teachers and a principal in a Catholic school received employee handbooks

setting out specific procedures and grounds for termination. When the sisters were notified that they would not be rehired for the next school year, they sued the bishop, the diocesan superintendent of schools and the parish school board asserting their rights under the contract. The trial court dismissed their action, ruling that the First Amendme nt precluded assumption of jurisdiction in religious disputes.

The Supreme Court of New Hampshire reversed in a carefully reasoned decision. Citing the neutral principles approach of *Jones v. Wolf. supra* , 433 U.S. 595, the court held that "[i]n religious controversies involving property or contractual rights outside the doctrinal realm, a court may accept jurisdiction and render a decision without violating the first amendment." (*Reardon et al. v. Lemoyne,* 454 A. 2d at 432). The court indicated concern for equal access to the courts:

> As one commentator has recognized, it would be unfair and illogical to deny access to the civil courts in non-doctrinal matters to parties who have voluntarily entered into civil contracts. See Ellman, *Driven from the Tribunal: Judicial Resolution of Internal Church Disputes,* 69 Cal. L. Rev. 1378, 1402-03 (1981). (*Id.* at 432).

The Court held that plaintiffs' right to procedural protections provided in their contracts, were wholly non-doctrinal and should have been decided by the court. "To the extent that the contract specified, and the defendants alleged, any secular reasons for non-renewal or dismissal, the court could properly have ruled on the sufficiency of such reasons. . . . However, other contractual grounds for non-renewal or dismissal may be found to involve doctrinal judgments which are clearly beyond the judicial sphere of authority. See *Jones v. Wolf,* 443 U.S. 595, 20 L. Ed 666." (*Id.* at 432-3).

The Appellate Court admitted that *Reardon* was facially irreconcilable to its decision but distinguished it because it did not involve a priest. Confusingly, the court argued elsewhere that such a distinction is meaningless for First Amendment analysis. (Appendix hereto p. 13a-14a, fn. 3, *infra*).

The decision below also conflicts with *Evangelical Lutheran St. Paul's Congregation v. Hass,* 187 N. W. 677 (Wisc. 1922) where the Supreme Court of Wisconsin held that the right of a congrega-

tion to remove its pastor is a temporal right so, unless otherwise clearly specified in the charter or by-laws of the congregation, civil courts will apply civil remedies to such disputes.

The decision omits any discussion of California's own Supreme Court decision in *Providence Baptist Church* v. *Superior Court* 40 Cal. 2d 55, 251 P. 10 (1952) which upheld jurisdiction to supervise the election of a pastor to insure the pastor was discharged according to the rules of the church.

The Appellate Court cited cases from other jurisdictions for the proposition that imposing employment standards upon church-affiliated employers frustrates the church's right to free exercise of religion. *Miller v. Catholic Diocese of Great Falls-Billings,* 728 P. 2d 794 (Mont. 1986); *Rayburn v. General Conference of Seventh-Day Adventists,* 772 F. 2d 1164 (C. A. 4 1985); *Simpson v. Wells Lamont Corp.*, 494 F. 2d 490 (C. A. 5 1974). Not one of these cases considered the issue presented here: namely, whether a civil court can enforce a civil contract by which a religious employer limits its own right to fire where the controversy involves no doctrinal issue.

The decision below also conflicts with *E.E.O.C. v. Mississippi College,* (C. A. 5 1980) 626 F. 2d 477 where the court held the employment of a professor of psychology at a religious educational institution was not immune from Title VII scrutiny.

The decision below also conflicts with the principle announced in *Turner v. Unification Church,* 473 F. Supp. 367, 370, 371 (D.C.R.I. 1978), aff'd, 602 F. 2d 459 (C. A. 1 1979): "those activities that are not solely in the ideological or intellectual realm, are subject to judicial review and may be regulated to achieve a sufficiently important state objective."

The case of *Granfield v. Catholic University of America,* 530 F. 2d 1035 (D.C. Cir. 1976) adjudicated contractual claims for equal pay between professors and their Catholic employer.

The decision below is also inconsistent with reported district court decisions. In *Dolter v. Wahlert High School,* 483 F. Supp. 266 (1980) the court allowed an inquiry, over a religious expression objection, into whether the moral precepts of the school were equally applied as between men and women and whether the teacher was in fact discharged because she was pregnant rather than because she violated the moral code of the school.

The decision below is also inconsistent with several reported appellate

decisions from state courts. In *Kupperman v. Congregation Nusach Sfard of Bronx,* 240 N.Y.S. 2d 315, (1963), for instance, the court allowed a suit for violation of the procedural guarantees of the contract "all of which cast the document in the category of a mundane contract of employment rather than a spiritual call . . ." *Id.* at 320.

The decision below conflicts with *Waters v. Hargest* (1979 Tex. Civ. App. Texarcana) 593 S.W. 2d 364, 365. There, the Court of Civil Appeals of Texas reversed the lower court's determination that the suit involved only issues of religious polity. It held that contractual rights were property rights to which the neutral principles of law should be applied.

The decision below cited *Corporation of Presiding Bishop v. Amos,* ____U.S.____ (1987), 97 L.Ed.2d 273 for the proposition that a Church-run institution, or an affiliated religious employer, has a constitutional right to protection from judicial scrutiny of all employment decisions, whatever the motivation behind them. (Appendix hereto p.17a, fn. 5 *infra*). However, *Amos* involved a case where the motivation was admittedly religious, and the issue was whether Congress could exclude such employers from Title VII prohibitions against religious discrimination. This Court cautioned in fn. 17: "We have no occasion to pass on the argument of the COP and the CPB that the exemption to which they are entitled under Section 702 is required by the Free Exercise Clause." *Id.* at 285.

The decision below relied heavily on Laycock, *Towards A General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy,* 81 Columbia L. Rev. 1373 (1981) as persuasive authority for the proposition that church sponsored employers are entitled to absolute autonomy in their labor relations in order to define their own mission the way they see fit. However, Laycock was addressing the specific problem of coercive legislative intrusions into church labor relations. The Appellate Court overlooks those parts of the Laycock work where he acknowledges that "[s]tate enforcement of a voluntary agreement is quite different from coercive state regulations." *Id.* at 1403. See also Adams & Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment,* 128 University of Penn. Law Rev. 1291, 1337 (1980).

The Appellate Court cited selective portions of the Laycock article to support its conclusion that Cleu, as a priest, is presumed to have submitted to church authority in all aspects of any position he

might assume with any church-sponsored employer. But, as Laycock cautions, employees have expectations very different from those who surrender their life to a specific religious order. One who has given up his life for the cloth, but who chooses to engage in his own profession much like any other employee, should expect that when he makes a contract with his employer the law will enforce it. See Laycock, *supra,* at 1407. One cannot, therefore, presume that Cleu waived his civil rights merely because he accepted a job with religious duties. Such a theory assumes a monolithic concept of "church" which is neither rooted in reality nor shared by those thousands of individuals who work in schools, hospitals, care homes and wineries because they expect to get the benefit of their bargain while they do "God's work." There are many different denominations and many orders within denominations. Different factions within denominations even compete with one another or deal with each other at arms length. *Gonzales v. Roman Catholic Archbishop of Manila,* 180 U. S. 1 (1929). To presume that Cleu, by accepting employment with Hospital, expected to be subject to dismissal without warning, in bad faith, ignores the expressed intentions of both parties revealed in the record of this case.

The case of *Flynn v. Maine Employment Security Commission,* 448 A. 2d 905 (Me. 1982) is instructive. There, a man was discharged for discussing his religious beliefs at work after he had accepted employment on the express understanding that he was not to proselytize. The Supreme Judicial Court of Maine determined that denial of unemployment benefits was not an unconstitutional burden upon his right to free exercise of religion. Said the Court, "[t]he Commission has not burdened his free exercise of religion, for he assumed the burden himself." *Id. supra* at 909.

II.

The decision below raises an important and unresolved issue, namely, whether employees who perform religious duties for employers sponsored by a religious order have the same right to enforce contracts as any other citizen.

The presumption that an employment of indefinite duration is terminable at will can be rebutted by evidence that the parties intended a different condition. *Perry v. Sinderman,* 408 U.S. 593 (1972); *Hepp*

v. Lockheed-California Co., 86 Cal. App. 3d 714, 150 Cal. Rptr. 408 (1978); *Hillsman v. Sutter Community Hospitals*, 153 Cal. App. 3d 743, 200 Cal. Rptr. 605 (1984); *Koehrer v. Superior Court*, 181 Cal. App. 3d 1155, 226 Cal. Rptr. 820 (1986); *Cleary v. American Airlines, Inc.*, 111 Cal. App. 3d 443, 168 Cal. Rptr. 722 (1980); *Pugh v. See's Candies, Inc.*, 116 Cal. App. 3d 311, 171 Cal.Rptr. 917 (1981); *Rulon-Miller v. IBM*, 162 Cal. App. 3d 241, 208 Cal. Rptr. 524 (1984); *Walker v. Northern San Diego County Hospital District*, 135 Cal. App. 3d 896, 185 Cal. Rptr. 617 (1982). This important principle has the salutary effect of securing the rights of employees who are otherwise powerless to protect themselves from overbearing employers.

Amicus below concede that civil courts do not intrude upon religious freedom by simply enforcing contractual arrangements between church-affiliated employers and their employees. (See Amicus brief filed by the Catholic Health Association of America, proceedings below, p. 1; Amicus brief filed below by the General Conference of Seventh-Day Adventists, p. 4). In *Gonzales v. Roman Catholic Archbishop of Manila*, 280 U.S. 1, (1929) this Court deferred to the Archbishop as the court of last resort because "the parties made them so by contract or otherwise." *Id.* 280 U.S. 1, 16. The 1983 Roman Catholic Canon Law decrees that church affiliated institutions are to observe the civil law of employment contracts. (See Request for Judicial Notice Number 5, Return to petition below). There is, therefore, no conflict between the requirements of the law and the exercise of the Catholic faith.

The court below deprived petitioner of his right to jury trial on the very fact issue which allows Hospital to invoke immunity, namely the religious motivation behind the decision to terminate him. (Seventh Amendment to the United States Constitution; *Brady v. Southern Railway Company*, 320 U.S. 476 (1943).

Refusing to adjudicate contracts simply because the litigants are members of religious organizations raises equal protection and establishment clause issues. Adams & Hanlon, *Jones v. Wolf: Church Autonomy and the Religion Clauses of the First Amendment*, 128 University of Penn. Law Rev. 1295, 1336 (1980). Justice Brennan said of the tax exemption in *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 518 (1979) fn. 11, "[S]uch an exemption, available only to church-operated schools, generates a possible Establishment Clause question of its own. *Walz v. Tax Commission*, 397 U.S. 664, 25 L.

Ed. 697, 90 S. Ct. 1409 (1970), does not put that question to rest. In upholding the property tax exemption for churches there at issue, we emphasized that New York had not 'singled out . . . churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations . . .' *Id.*, at 673."

In this case the state has put the force and effect of law behind a decision by a public benefit corporation to breach its contract. No other public or private institution has a privilege to pick and choose which of its contracts it will perform and which it will not. The decision singles out religiously inspired efforts for special limits on contractual freedom. (Ellman, *Driven From the Tribunal: Judicial Resolution of Internal Church Disputes*, 69 Cal. L. Rev. 1378 (1981). Such a rule will certainly send a message of endorsement by giving church-sponsored institutions economic leverage in the secular realm that other institutions do not enjoy and which is unnecessary to protect the free exercise of religion. See concurring opinion of Justices Brennan and O'Connor in *Corporation of the Presiding Bishop of the Church of Jesus Christ Latter-Day Saints, et al. v. Amos*, ___ U. S. ___ (1987), [97 L.Ed.2d 273, 279].

The court below concluded that a priest "would in the normal course of things look not to the secular authorities but to his church for employment security." (Appendix hereto p.17a, *infra*). "Because he is not an outsider, but one who belongs to the Church and has voluntarily submitted himself to its discipline, he has to some extent given up his right to invoke the aid of a secular tribunal in deciding controversies between himself and the Church." (Appendix p. 9a, *infra*).

The Court has defined the relationship between a priest and his employer as one in which the servant is the property of his master. In its attempt to avoid a free exercise problem the court below defined petitioner's rights *as a priest*, not as a citizen. Its decision is not the result of the application of neutral principles to the civil contract entered into between the parties.

If the government does not require a showing that the re is in fact an identifiable burden on the exercise of religion before it immunizes an employer from sanctions for breach of contract then the objective observor is likely to perceive that the government endorses the be-

lief that a hospital should be able to break promises for the sake of defining its religious mission.

Such a rule invites abuse. The record below shows that the same defense has been used by the same defendant in at least one other case of wrongful discharge of an executive who was not a priest and who had no religious duties. (Response to Petition below, Request for Judicial Notice number 3). Unless clarified the rule announced below will inspire similar defenses across the nation.

> As the general type of factual situation in *O'Connor Hospital* will doubtless occur again, the opinion pro vides sorely needed guidance to religious organiza tions and certain of their employees that will greatly aid in evaluating employment-related decisions. (Appendix hereto pp. 22a-23a, *infra*).

And further:

> Since the opinion was first published, we have be en contacted by other counsel, both in California and from other jurisdictions, who have expressed considerable interest in the opinion in their capacities as counsel for religiously sponsored employers. . . [t]he issues discussed in the O'Connor Hospital decision will undoubtedly come before civil and appellate courts again. (Appendix hereto p. 24a-25a, *infra*).

The decision below adopted a "blind deference" approach to religious authority which has been rejected by this Court, by the highest courts of three states and several federal circuit courts of appeal. These jurisdictions have applied neutral principles of law in order to strike a necessary balance between the public's interest in protecting the expectations of parties to contract and the church's interest in assuring the case will not involve civil authorities in ecclesiastical affairs. In the nine years that have elapsed since this Court's ruling in *Jones v. Wolf, supra* a substantial conflict has arisen among the several jurisdictions as to its application. This Court has the opportunity to guarantee the uniform application of this approach to thousands of employees across the nation who perform critical services for church-sponsored employers without endangering the freedom guaranteed by the Free Exercise Clause of the First Amendment. A priest is still a citizen of the United

States. His civil rights would be hollow indeed if his place of residence determined whether or not they could be enforced. Inaction will sentence thousands of employees, lay and clerical, to suffer the burdens of citizenship and yet be deprived one of the most fundamental benefits of citizenship: the right to adjudication of civil rights in a neutral forum.

CONCLUSION

Petitioner respectfully requests that the Court grant this petition. Neutral principles can be applied to this case to determine (1) did Hospital follow the termination procedures, (2) did Hospital discharge Cleu on a contractually impermissible ground, (3) was Cleu discharged for religious reasons. If he was not discharged for religious reasons then (4) was he discharged for good cause consistent with the employment contract.

Petitioner respectfully submits that requiring Hospital to pay damages for wrongfully discharging Cleu will impose no burden upon the beliefs of the Daughters. Nor will it interfere with their ability to express their mission through works since it imposes upon them no duty which they did not voluntarily assume. To require Hospital to pay damages for actions motivated by secular reasons will not intrude upon Hospital's right to discharge its chaplain for doctrinal reasons. On the other hand, to deny Cleu his right to enforce a promise in order to grant Hospital absolute autonomy in its employment actions threatens to make the First Amendment the "handmaiden of arbitrary lawlessness, fraud and corruption." (See dissenting opinion by Justice Rehnquist in *Serbian Eastern Orthodox Diocese, Etc. v. Milivojevich,* 426 U.S.729, 728 (1976)).

Respectfully submitted,

PHILLIP J. GRIEGO
111 W. St. John St., Suite 404
San Jose, CA 95113
(408) 293-6341
Counsel of Record for Petitioner

APPENDIX

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA

Court convenes at SAN JOSE

DATE, June 11, 1987

PRESENT: HON Conrad L. Rushing, JUDGE

PAUL CLEU v. O'CONNOR HOSPITAL,
et al.
_____/

NATURE OF PROCEEDINGS:

The motion of defendant O'CONNOR HOSPITAL for summary judgment heard on May 18, 1987 is denied.

There is a material issue whether plaintiff was terminated by the act of a religious superior or merely a secular employer. Plaintiff has introduced evidence that neither his hiring nor his termination was the product of a decision by the Catholic Church hierarchy. Plaintiff was not appointed to his position or terminated by the Bishop of San Jose. Plaintiff's job performance was not supervised or evaluated by the Bishop. Plaintiff was hired, supervised, and terminated by Father Durkin, acting for Defendant. There is a material issue whether Father Durkin was plaintiff's religious superior. Although civil courts must accept the decision of church tribunals (*Serbian Eastern Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696, 713), there is evidence that the decision to terminate was not the decision of such a tribunal or hierarchy.

There is also an issue whether defendant O'CONNOR was an extension of the Catholic Church hierarchy or more akin to a private employer. Defendant is not a church or parish and there is an issue whether it is a quasi-parish. Plaintiff was hired, supervised, and terminated by Father Durkin, who was not necessarily his reli-

gious superior within the church hierarchy. There is evidence that plaintiff was told that certain personnel policies and procedures established by defendant were applicable to his position. There is some question then whether this suit concerns a determination as to who will preach from the pulpit of a church. (See *Simpson v. Wells Lamont Corp.* (5th Cir. 1974) 494 F.2d 490.). The trial of a special defense along these lines might be in order, but these issues, intermixed as they are, cannot be resolved as a matter of law.

Defendant has established that the duties performed by plaintiff were primarily of a religious nature. (Issue. No. 2.) This does not establish, however, that a decision by a private employer to terminate an employee serving in a religious position is an exercise of freedom of religion. This is especially true when an employee of a private employer is terminated for non-religious reasons. There is no evidence that plaintiff was terminated because of his religious beliefs.

The Court finds that defendant's Issue Nos. 1 and 2. are entitled to summary adjudication.

Issue No. 3 is disputed to the extent that defendant has not establishe d that defendant was required to terminate plaintiff if the Bishop disapproved of his service. There is an issue as to whether defendant was controlled by the Catholic Church.

Issue No. 5 is disputed for reasons previously discussed. Issue Nos. 4 and 6 are disputed because plaintiff has introduced circumstantial evidence of defendant's motivation for his termination and defendant's state of mind.

Summary adjudication is, therefore, denied as to plaintiff's Issue Nos. 3, 4, 5, and 6.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

O'CONNOR HOSPITAL,

Petitioner,

v.

THE SUPERIOR COURT OF
SANTA CLARA COUNTY,

Respondent;

PAUL E. CLEU,

Real Party in Interest.

No. H003221

(Santa Clara County
Super. Ct. No. 609434)

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This wrongful termination lawsuit is brought by real party in interest, Father Paul E. Cleu, a Roman Catholic priest discharged from his former position as Associate Chaplain of petitioner O'Connor Hospital (Hospital), a hospital sponsored and operated by the Daughters of Charity of Saint Vincent de Paul (Daughters), a religious order of the Roman Catholic Church (Church). By petition for writ of mandate, Code of Civil Procedure section 437c, subdivision (1), Hospital seeks to compel summary judgment in its favor on the ground of its immunity from suit under the First and Fourteenth Amendments for its allegedly religiously motivated decision to discharge Father Cleu. The trial court denied summary judgment because it perceived these justiciable factual issues: (1) whether the person discharging Father Cleu, Father Durkin, was his religious superior, related to the

issue whether Father Cleu was discharged by decision of a religious tribunal or hierarchy; (2) whether Hospital is an extension of the Church or is a private employer subject to secular and civil law control over its employment termination decisions.

The trial court granted partial summary adjudication as follows: (1) Hospital is sponsored and operated by a religious order, identified above; (2) Father Cleu was fulfilling a religious, ecclesiastical role in serving as Associate Chaplain of Hospital.

RECORD

Father Cleu filed this wrongful termination lawsuit against Hospital on August 14, 1986, alleging Hospital hired him as Associate Chaplain by oral agreement on March 14, 1983. The agreement incorporated written policies and procedures which promised him continued employment during satisfactory performance, and advance notice of deficiencies and opportunity to correct them before terminating his employment. He was given a written brochure describing these policies. In breach of this agreement and of the implied covenant of good faith and fair dealing, he was fired without advance warning, despite satisfactory performance of his duties, in violation of the policies and procedures handbook and of the agreement.

Father Cleu was told to look elsewhere for employment in August 1985. His termination was made official on October 31, 1985, but his salary was continued to July 31, 1986.

Hospital answered asserting among other things affirmative defenses based on the First and Fourteenth Amendments to the U.S. Constitution, saying the decision to fire Father Cleu was faith based, an ecclesiastical decision immune from judic ial review. On that basis Hospital sought summary judgment.

Hospital has not claimed the reasons for discharging Father Cleu stem from doctrinal differences of opinion. In his declaration, Father Patrick J. Durkin, the Hospital Chaplain and Father Cleu's immediate supervisor, said the decision to terminate Father Cleu was jointly arrived at by Father Durkin and Sister Eileen Kenny, Chairperson of the Board of Hospital, because they decided Father Cleu was rigid and confrontational and was causing too much tension with the Siste rs in the operation of Hospital. Father Durkin also said he discussed these problems repeatedly with Father Cleu but the latter would never

acknowledge any fault. The facts of each such dispute were, according to Father Durkin, sometimes ecclesiastical and sometimes not. He did not further elaborate.

Regarding the relevant chain of authority, Father Durkin said all members of the Hospital staff serve at the pleasure of their respective religious orders or dioceses. The pastoral care staff consists entirely of Catholic religious personnel, other than a secretary. Father Cleu's position of Associate Chaplain could only be held by a Roman Catholic priest. The consent of the local ordinary, the Bishop of the Dioce se of San Jose, was necessary before Father Cleu could take the position, by virtue of the Diocese's general jurisdiction over the Hospital located within its bounds; but also Father Cleu needed the consent of his Bishop, the Bishop of Oakland, who incardinated him. Father Cleu's duties included both secular functions, such as giving comfort and counseling, and religious functions, such as administering the sacrament.

Father Durkin admitted he never followed with Father Cleu the counselling and warning procedures prescribed in the employee handbook distributed by Hospital.

In her declaration, Sister Kenny described the principles applicable to the operation of Hospital by the religious order of the Daughters. She said pastoral care played a central religious role in the Daughters' mission in operating the hospital. She said a Catholic healthcare facility such as Hospital is an ecclesiastical community participating in the mission of the Church through the ministry of healing.

Further, she said morale problems developed at Hospital after Father Cleu was hired. The Sisters complained he was not available when on call, was reluctant to come when called, refused to administer the Sacrament of the Sick to patients he did not consider good Catholics, was short tempered and antagonistic, and exhibited an unsuitable attitude for a chaplain.

The declaration of Reverend John Folmer, a canonical law expert and staff attorney to the Archdiocese of San Francisco, said Father Cleu is a diocesan priest incardinated by the Bishop of Oakland, but he was required to and did obtain his faculties or powers to perform the religious aspects of his position at Hospital from the Bishop of San Jose who has jurisdiction over Hospital for this purpose. Also he said Father Cleu reported to, was hired by, and functioned under direct supervision of, Father Durkin. Further, Reverend Folmer said

the chaplaincy of a Catholic hospital is a quasi-parish or ecclesiastical community, under jurisdiction of the local ordinary or bishop. In Reverend Folmer's opinion, a chaplain has no vested right to his office and may be removed with no legal cause whatsoever. Further, the duties of a chaplain are identical to those of a pastor or priest with respect to the latter's parish, except that the chaplain's faculties are limited to those necessary in a hospital setting.

The job description for the position of chaplain at Hospital said the position requires a Catholic priest with the continuing endorsement of the Ordinary of the Diocese. His primary responsibility is "serving the spiritual, emotional and attitudinal well being of patients, families and staff of the hospital."

In his deposition, Father Cleu said the reasons Father Durkin gave him for termination were that he does not agree with the Daughters' philosophy and he does not get along well with the nursing staff or the Sisters. Father Cleu denied these reasons were true. Although unclear, he apparently believed he was terminated because of an irrational dislike of him by Sister Kenny.

Father Cleu pointed to favorable reviews of his performance in February of 1984 and March of 1985 and to a salary increase given him in March 1984. He said he gave up a favorable job opportunity in southern California to remain in this position and was compensated by the raise in salary. Neither Father Durkin nor anyone else gave him any warning he would be discharged until suddenly in August of 1985 he was told to look elsewhere.

Also he said he spent the vast majority of his time in the position performing nonreligious tasks, such as administrative work or patient counselling.

Father Cleu said it is a tenet of the Church that a priest in carrying out his duties carries out God's work. He believed he was doing that at Hospital.

In the opinion of Father Maurice Francis Shea, a diocesan priest and presiding judicial officer of the Tribunal of the Diocese of San Jose, a hospital is not and cannot be a quasi-parish. Further, the Bishop plays a limited and largely ceremonial role in approving the hiring of a chaplain. He also said no ecclesiastical remedy was realistically available to Father Cleu here other than this civil lawsuit, which suit is permissible under canon law.

The trial court, denying Hospital's motion for summary judg-

ment, said it could not resolve as a matter of law whether Father Cleu was terminated by the act of a religious superior or merely a secular employer. It is unclear whether Father Durkin, who terminated him, is his religious superior, and also in dispute whether the decision of Hospital is equivalent to a decision of the Catholic hierarchy. Also the court said there is evidence Father Cleu was told certain personnel policies and procedures applied to his position. Finally, there is "no evidence that plaintiff was terminated because of his religious beliefs."

However, the trial court granted summary adjudication in favor of Hospital on these issues: (1) "O'Connor Hospital is an institution sponsored and operated by the Daughters of Charity of Saint Vincent de Paul, a religious order of the Roman Catholic Church"; (2) "Father Cleu was fulfilling a religious, ecclesiastical role in serving as an Associate Chaplain at O'Connor Hospital."

DISCUSSION

For purposes of summary judgment, Father Cleu has here stated the elements of the California tort of wrongful discharge, based on allegations Hospital has violated implied and express promises not to terminate without good cause nor without first following certain warning procedures which admittedly were not used here. The issue presented is whether permitting Father Cleu to sue for damages for wrongful discharge imposes a constitutionally impermissible burden on Hospital's right of free exercise of religious belief protected by the First and Fourteenth Amendments.

Although the particular factual pattern presented here is somewhat novel, the basic issue of reconciling freedom of religious action with the obligations imposed by secular law is not new. As has been said many times, although freedom of belief under the First Amendment is absolute, freedom of action cannot be; "Conduct remains subject to regulation for the protection of society." (*Cantwell v. Connecticut* (1940) 310 U.S. 296, 304, fn. omitted.) Among the religiously motivated behaviors which have been held legitimately forbidden on account of compelling governmental interest are the Mormon practice of polygamy (*Reynolds v. United States* (1878) 98 U.S. 145); sale by children of religious literature (*Prince v. Massachusetts* (1944) 321 U.S. 158); itinerant solicitation at a fairground (*Heffron v. Int'l*

Soc. for Krishna Consc. (1981) 452 U.S. 640); required health measures such as vaccinations, blood transfusions, or X-rays, even where objected to on religious grounds (*Jacobson v. Massachusetts* (1905) 197 U.S. 11; *Jehovah's Witnesses in State of Wash. v. King County Hosp.* (W.D. Wash. 1967) 278 F.Supp. 488, affd. (1968) 390 U.S. 598; *State v. Armstrong* (Wash. 1952) 239 P.2d 545). On the other hand, even criminal behaviors have occasionally been protected on First Amendment grounds, as in the California decision finding use of peyote by the Native American Church to be a protected activity despite its illegality. (*People v. Woody* (1964) 61 Cal.2d 716.)[1] That decision weighed the competing values represented on the one side by the central importance of use of peyote to the religion involved, as against the state's interest in regulating the use of the substance, and found the balance tipped in favor of constitutional protection. In *People v. Woody*, and in all such cases considering governmental action which burdens religious freedom, courts compare the severity of the burden on free exercise of religion with the importance of the governmental interest served by the regulation in determining whether the regulation may be imposed. In general, once the central importance to a religious belief is established, it takes a compelling governmental interest to justify restriction, and it must also be shown the regulation is the least burdensome imposition possible to achieve the governmental purpose. (See *United States v. Lee* (1982) 455 U.S. 252, 257; *People v. Woody supra.*, 61 Cal.2d at p. 727.)

These principles are also relevant when the issue is not regulation by statute or administrative code, but imposition of liability to respond in damages in a civil law suit. Such liability is also a burden which may or may not be permitted in a given case. Again, a weighing process is appropriate: the importance of the interests vindicated by the lawsuit against the centrality to religious belief of the allegedly tortious conduct.

At one end of the spectrum of such lawsuits we find the case where a religious organization is asked to respond in damages to an outsider based on secular dealings. In such cases the legitimacy of the secu-

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[1] See also the midwife licensing case *Northrup v. Superior Court*, (1987) 192 Cal.App.3d 276.

lar liability is taken for granted, and no decision appears to question the appropriateness of requiring a religious body to respond in damages under such circumstances. (E.g., *Saul v. Roman Catholic Church of Arch. of Santa Fe* (N.M. 1965) 402 P.2d 48 [liability of archdiocese to respond in damages in nuisance claim against Church.]) At the other end of the spectrum, where courts have uniformly declined involvement, are disputes regarding "who will preach from the pulpit of a church" (*Simpson v. Wells Lamont Corp.* (5th Cir. 1974) 494 F.2d 490, 492), that is, controversies revolving about the hiring or discharge of a minister or priest. In such cases, the question who shall fill the pastoral position is deemed so close to the heart of the religious purpose of the church or congregation as to be entirely an ecclesiastical matter protected from any secular judicial intrusion by the First Amendment. (See, e.g., *Hutchison v. Thomas* (6th Cir. 1986) 789 F.2d 392; *Rayburn v. General Conf. of Seventh-Day Adventists* (8th Cir. 1985) 772 F.2d 1164; *Kaufman v. Sheehan* (8th Cir. 1983) 707 F.2d 355.)[2] The decision in *Rayburn v. General Conference of Seventh-Day Adventists, supra,* points out a pastor functions as a liaison between the Church and the congregation, and is in a position to influence them, garbed with the authority and prestige of the institution. He carries the Church imprimatur as a worthy spiritual leader and an example to the members. Accordingly government standards have no place in selecting spiritual leaders. (*Rayburn, supra,* 772 F.2d 1164, 1168-1169.)

Our case falls somewhere between the extremes. Father Cleu is indeed clergy, an ordained priest; but his position is not identical to that of a priest or minister empowered to preside over a congregation or parish. Because he is not an outsider, but one who belongs to the Church and has voluntarily submitted himself to its discipline, he has to some extent given up his right to invoke the aid of a secular tribunal in deciding controversies between himself and the Church.

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[2] See also *McClure v. Salvation Army* (5th Cir. 1972) 460 F. 2d 553, finding employment decisions regarding a Salvation Army minister exempt from a federal civil rights action under Title VII of the 1964 Civil Rights Act, for the same reasons expressed in the constitutional decisions cited in the text, that the choice of minister is central to the autonomy of a religious organization and not subject to any secular regulation.

(See generally Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy* (1981) 81 Colum.L.Rev. 1373, 1406 [hereafter Laycock].)

However, his employer is not the Church itself but an organization sponsored by and affiliated with the Church, namely, a religious order. Further, he contends the decision to discharge him does not rest on doctrinal grounds and review of that decision will not entangle the court in questions of canon law, a reason frequently given to abstain from jurisdiction. (The seminal decision is *Serbian Orthodox Diocese v. Milivojevich* (1976) 426 U.S. 696.) He cites, for example, the decision in *Jones v. Wolf* (1979) 443 U.S. 595, permitting adjudication of church property disputes involving no doctrinal matters but only the application of "neutral-principles" of law. (Id. at p. 606.) Father Cleu points out language in *Jones v. Wolf*, supra specifically referring to employment decisions: "The neutral-principles approach cannot be said to 'inhibit' the free exercise of religion, any more than do other neutral provisions of state law governing the manner in which churches own property, *hire employees*, or purchase goods." (*Ibid.* emphasis added.)

However, as at least one commentator has noted, the above language in *Jones v. Wolf* has never been interpreted as automatically conferring secular jurisdiction over all church employment relations. (See generally Laycock, *supra* at p. 1409, fn. 270.) Rather, in deciding to what extent church employment decisions are subject to regulation, the courts have used the same analytic approach discussed above with reference to free exercise problems generally, asking the importance of the employee to the religious mission, the extent to which he carries the imprimatur of the church and in a sense represents it in his employment duties, and the invasion of church autonomy and privacy entailed by the particular regulation or lawsuit. These considerations have been discussed both in Title VII employment discrimination cases and in other varieties of wrongful termination litigation. Consideration of the individual decisions is helpful.

First, there are cases involving lay teachers in parochial schools. Two such decisions found so close a nexus between the manner of teaching and the religious educational mission of the school as to insulate the religious employer from wrongful discharge liability. In *Maquire v. Marquette University* (E.D. Wis. 1986) 627 F.Supp. 1499, mod. (7th Cir. 1987) 814 F.2d 1213, the court would not scrutinize a re-

ligious college's refusal to hire a professor of theology based on at least one doctrinal reason, differences of opinion regarding abortion. In *Miller v. Catholic Diocese of Great Falls* (Mont. 1986) 728 P.2d 794, the court would not entertain a wrongful discharge suit brought by a former lay teacher in a parochial school discharged, according to defendant, for inadequate disciplining of her students. The court viewed teacher disciplinary methods as important to the religious purpose of the school.

The *Miller* case, like this case, was a state tort action for wrongful discharge. Involving as it did a lay teacher teaching nonreligious subjects, it presented in some respects a weaker case than does this for conferring immunity on the religious employer under the constitution. The stated reason for the discharge was the parochial school was dissatisfied with the teacher because of her disciplinary methods, and the school authorities considered discipline essential to the successful mission of the school. The deposition of one of the Fathers said he could not successfully teach religion to her students because of the absence of proper discipline. (*Id.* at p. 796.) Plaintiff, however, claimed (1) that this reason was false and that her discipline was excellent; (2) that the procedures whereby she was disc harged violated due process and express promises couched in regulations requiring hearings or other procedures before terminating an employee. The majority opinion, nevertheless, said even to inquire into the validity of these claims would violate the Church's right of free exercise because it would necessitate inquiry into what discipline is appropriate in a Catholic school, a subject fraught with religious significance and therefore immune from judicial scrutiny. The opinion did not discuss the denial of procedural due process, although the dissenting opinion of Justice Hunt pointed out there are cases willing to review whether the expelling organization has acted in accordance with its own regulations. (See *Miller, supra* at p. 799, and cases cited therein.)

The rationale of the majority opinion in *Miller* is summarized thus: "Because allowing [Plaintiff's] lawsuit to go forward would impermissibly interfere with the free exercise of religion, we affirm the summary judgment . . . [in favor of defendant]." (*Id.* at p. 797.) In short, the burden of having to defend a lawsuit questioning the termination of a teacher in a parochial school, where religious questions might be involved, was held to be an unwarranted inhibition of the Church's right of free exercise. The court said "[a] judicial

determination of the presence or absence of good faith on the part of Father Wagner [the declarant] would require the court to examine the school's discipline policy as applied to classroom instruction covering both religious and nonreligious subjects, and to evaluate Father Wagner's interpretation and application of that discipline policy. Such an examination of necessity would impinge upon elements of the teaching of religion, or the free exercise of religion. . . . [A] court cannot properly make the determination requested here without interfering with a legitimate claim to the free exercise of religion." (*Id.* at p. 797.) Further, the court weighed the importance of entertaining the common law wrongful discharge action against the burden on free exercise and found the latter more important: "Mrs. Mullner's tort claim is not a right 'of the highest order and not otherwise served' so as to overbalance defendants' claim to the free exercise of religion." (*Ibid.*, applying the test of *Wisconsin* v. *Yoder*. (1972) 406 U.S. 205, 215.)

Miller illustrates a view like that expressed in Laycock, supra that free exercise of religion requires a considerable degree of autonomy in the operation not only of the church itself but of many large religious institutions under its auspices. (Laycock, *supra* at pp. 1408-1409.) Laycock explains the church/employee relationship as follows: "The free exercise of religion includes the right to run large religious institutions—certainly churches, seminaries, and schools, and . . . hospitals, orphanages, and other charitable institutions as well. Such institutions can only be run through employees. It follows at the very least that the free exercise of religion includes the right of churches to hire employees. It surely also follows that the churches are entitled to insist on undivided loyalty from these employees. The employee accepts responsibility to carry out part of the religious mission. . . . [C]hurches rely on employees to do the work of the church and to do it in accord with church teaching. When an employee agrees to do the work of the church, he must be held to submit to church authority in much the same way as a member." (Laycock, *supra* at pp. 1408-1409, fns. omitted.) It will be noted Laycock includes hospitals in his list of institutions which should be sheltered from labor relations regulation.

The cases involving teachers in religious schools clearly recognize the doctrinal purpose which permeates instruction in such schools. Anything more than a minimum of secular control and interference

must necessarily inhibit the organization's freedom to teach in a manner consistent with and expressive of its religious philosophy. In a real sense, teachers in such schools play a role closely resembling that of priests or ministers; both speak to their audiences, whether from pulpit or lectern, both can potentially enhance or damage the message the church wishes to communicate, both are in a position to influe nce the minds of their listeners in myriad subtle ways. Accordingl , it is consistent for courts to have eschewed involvement in employment decisions regarding both parochial teachers and pastors.[3]

Here, we deal with employment of a hospital chaplain. He is a priest, wearing the robes of the Church; the trial court has characterized his function as primarily religious, and he has himself admitted he is doing God's work for the Church. In this sense, he is in the same position as a pastor or a teacher; he is garbed with Church authority, in a position to influence the minds of the faithful, and in a sense the Church's representative clothed with its imprimatur. All these factors tend to tip the constitutional scales in favor of forbidding judicial involvement with the Church's autonomy in the decision to discharge him. As in *Miller*, Father Cleu here has claimed the reasons for firing him are not religious; but as in *Miller*, the very inquiry into those reasons is itself something of an intrusion into the Church's sphere of exclusive control over those who do its work.

On the other hand, there are differences between hospitals and schools. The most obvious such difference is that a hospital is necessarily subject to a great deal of secular regulation in matters of qualifications of its staff, sanitation, health procedures, insurance, and related matters. It could be argued that by operating an institution necessarily subject to extensive secular regulation, the Church has agreed to forego its right of exclusive control generally over the running of

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[3] A federal decision reaching a similar result, discussed in Laycock, found the National Labor Relations Act could not apply to teachers' unions in Catholic schools without invalidly infringing the Church's control of its ecclesiastical institutions. (*Catholic Bishop of Chicago v. N.L.R.B.* (7th Cir. 1977) 559 F.2d 1112, affd. on other grounds (1979) 440 U.S. 490,cited in Laycock *supra*, at p. 1374.) (Footnote continued on next page.),

such an institution, or put another way, the Church has a lesser right of autonomy and privacy in the operation of a hospital than in the running of its churches or schools. However, although this argument might have compelling force applied to the hospital's health care personnel, it is more difficult to find justification for interference between the religious order and the hospital chaplain, whose function, as the trial court found, is primarily a religious one.

In addition to cases involving teachers, two decisions deal with other varieties of employee termination situations. One decision held it was permissible to deny unemployment insurance benefits to a discharged security guard at a Catholic hospital who preached religious doctrine to the employees and patients despite an initial promise not to do so. (*Flynn v. Employment Sec. Com'n.* (Me. 1982) 448 A.2d 905.) The court held such denial was not an impermissible burden on the employee's right of free exercise of religion (despite *Sherbert v. Verner* (1963) 374 U.S. 398, which held such benefits could not be denied to Sabbatarians discharged for refusing to work on Saturday). *Flynn* is different from this case because it considers the free exercise rights of the employee, not the hospital; but it is relevant in its willingness to permit the hospital a degree of autonomy in regulating its employee's conduct which might well have been inappropriate were the hospital a secular institution (like the employer in *Sherbert v. Verner. supra*).

The other decision holds a reporter discharged from the employment of the Christian Science Monitor because she was a lesbian had no redress under Massachusetts or federal law. (*Madsen v. Erwin* (Mass. 1985) 481 N.E.2d 1160.) That case, as pointed out in the dissenting opinion, most properly rests on a nonconstitutional basis, namely, that neither the Massachusetts tort of wrongful discharge nor the Federal Civil Rights Act protects an employee from being fired onaccount of sexual preference. However, the decision

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(Footnote continued from previous page.)
A contrary decision relied on heavily by Father Cleu is *Reardon v. Lemoyne* (N.H. 1982) 454 A.2d 428, permitting discharged nuns to sue a parochial school for breach of employment contract. Although admittedly *Reardon* and *Miller* cannot be reconciled, both are distinguishable from our case because the discharged employees (nuns working as teachers and a principal at a parochial school, in *Reardon*; a lay teacher in *Miller*) were not priests or ministers and were not directly performing any religious duties.

is interesting because the majority opinion applies the judicial a bstention doctrine of *Serbian Orthodox Diocese, supra* 426 U.S. 696, holding because the reporter is a member of the church, and the church owns the newspaper and is the employer, the court must defer to the church's decision; this relationship is immune from judicial scrutiny. The decision explicitly approves and applies Laycock's theory of religious institutional imunity in disputes with "insiders" affecting employment relationships within church-run institutions. (Laycock, *supra* at p. 1407.) Also, the court found it important that the basis for the discharge was religious (church abhorrence of homosexuality), although the employee's position was not religious. Engaging in a balancing analysis under the First Amendmnt, the Massac husetts court decided the interest of the state in protecting the stability of employment of homosexuals was outweighed by the damage done by such a lawsuit to the church's free exercise rights.

Inasmuch as here, the plaintiff is not only a Church member but a priest of the Church, and his employment, unlike that of the reporter in *Madsen*, is primarily religious, this case presents a stronger argument for judicial noninvolvement than did that decision.

As another commentator puts it, where an employee's primary duties are religious, then he is "'clergy'" for purposes of deciding whether secular intrusion is permissible. (Bagni, *Discrimination in the Name of the Lord: A Critical Evaluation of Discrimination by Religious Organizations* (1979) 79 Colum.L.Rev. 1514, 1545.)

Father Cleu seeks to rely on a recent United States Supreme Court decision which refused to enjoin a state civil rights commission investigation of the firing of a teacher in a christian fundamentalist school for alleged sexually discriminatory reasons (refusal to permit new mother to work, coupled with firing because teac her brought civil suit). (*Ohio Civ. Rights Com'n. v. Dayton Christian Schools* (1986) 477 U.S. 619.) That case, however, explicitly deferred consideration of the constitutional issue s, holding only that *Younger* abstention (*Younger* v. *Harris* (1971) 401 U.S. 37) was appropriate.[4]

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[4] The *Younger* v. *Harris* abstention doctrineprevents a federal court from enjoining a state proceeding where the constitutional claim can be adequately raised in the state action.

A decision under the Civil Rights Act held the employment of a professor of psychology at a religious educational institution was not immune from Title VII scrutiny. (*E.E.O.C.* v. *Mississippi College* (5th Cir. 1980) 626 F.2d 477.) However, that decision is probably inconsistent with the United States Supreme Court's recent interpretation of Title VII's exemption for certain religious employers. (See *Corporation of Presiding Bishop v. Amos* (1987) U.S. [97 L.Ed.2d 273, 279].) That decision interpreted section 702 of the Civil Rights Act of 1964, the exemption from the Act's provisions forreligious employers with respect to "'the employment of individuals of a particular religion to perform work connected with the carrying on by such [religious employer] of its activities.'" (*Id.* at p. 279, fn. 1.) The discharge was of a secular employee, a building engineer in a nonprofit gymnasium run by the Mormon Church.

More germane to our purposes, the *Amos* case also held the conferring of such exemption did not violate the establishme nt clause of the First Amendment. Unlike *Amos*, our case does not involve interpretation of the establishment clause; we deal solely with a claim of infringement of the right of free exercise of religion. (See generally Laycock, *supra* at pp. 1380 et seq.) It has been suggested , however, that any exemption of a religious authority from secular regulation on free exercise grounds confers a special benefit which may tend to violate the establishment clause. (Bagni, *supra* 79 Colum.L.Rev. at p. 1515, text and notes 5 and 6.) *Amos* , however, is inconsistent with that interpretation; it holds that only direct governmental sponsorship or subsidy amounts to an establishment of religion. (Citing, e.g., *Walz v. Tax Commission* (1970) 397 U.S. 664; *Board of Education v. Allen* (1968) 392 U.S. 236; *Lemon v. Kurtzman* (1971) 403 U.S. 602, 612.)

The First Amendment states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." (U.S. Const., lst Amend.) This proscription requires any burden upon the free exercise of religion to be justified by a compelling government interest. (*Sherbert v. Verner, supra.* 374 U.S. at p. 406; *Board of Education v. Barnette* (1943) 319 U.S. 624, 639.) Here we weigh the values protected by allowing a Roman Catholic chaplain at a nonprofit religious hospital to sue the hospital for wrongful termination, against the religious freedom of the Daughters to express their mission through works at the hospital, and conclude the

constitutional scales tip in favor of the latter. In making this decision we are cognizant, among other things, of the central fact plaintiff is a priest, who would in the normal course of things look not to the secular authorities but to his Church for employment security. Also, as we have stated, his role has been characterized as primarily religious. The declaration of Sister Kenny is uncontradicted, that pastoral care plays a central religious role in the Daugh ters' mission in operating the Hospital. Under these facts it is inappropriate to inquire into the reasons for the discharge.[5] Summary judgment should have been ordered for Hospital.

Let a writ of prohibition issue as prayed preventing any further proceedings in this matter other than dismissal of the action. Our temporary stay of proceedings shall remain in effect until this opinion becomes final.

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[5] We do not consider it necessary to decide what hierarchical authority applies to Father Cleu's employment. The affiliation of the Daughters with the Church, and the shared religious purpose of both, coupled with the primarily religious nature of Father Cleu's duties at Hospital, determine the First Amendment issue. The employer may be either the Church, a Church-run institution, or an affiliated religious employer to invoke the constitutional protection. (See *Corporation of Presiding Bishop v. Amos, supra,* 97 L.Ed.2d 273; *Madsen v. Erwin. supra,* 481 N.E.2d 1160.)

Agliano, P.J.

WE CONCUR:

Brauer, J.

Capaccioli, J

O'CONNOR V. SUPERIOR COURT (CLEU)
No. H003221

6th District, No. H003221

S003187

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

O'CONNOR HOSPITAL, Petitioner,

v.

SUPERIOR COURT OF THE COUNTY OF SANTA CLARA, Respondent,
CLEU, Real Party in Interest.

Petition for review of Real Party in Interest is DENIED.

The Reporter of Decisions is directed not to publish in the Official Appellate Reports the opinion in the above-entitled appeal filed October 14, 1987, which appears at 195 Cal.App.3d 546. (Cal. Const., Art. VI, section 14; Rule 976, Cal. Rules of Court.

LUCAS

Chief Justice

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or eman-

cipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

January 4, 1988

The Honorable Chief Justice
and Associate Justices
Supreme Court of California
455 Golden Gate Avenue, Room 4250
San Francisco, California 94102

Re: O'CONNOR HOSPITAL, Petitioner v.
SUPERIOR COURT OF THE COUNTY OF SANTA CLARA,
Respondent; Cleu, Real Party in Interest.
No. S003187 [6th District No. H00322111

Dear Honorable Justices:

This firm represents the Roman Catholic Archdiocese of Los Angeles ("Archdiocese"). The Archdiocese recently learned of the Supreme Court's order dated December 23, 1987, denying respondent's petition for review and decertifying the Court of Appeal opinion in *O'Connor Hospital v. Superior Court*, 195 Cal. App. 3d 546 (1987). Although the Archdiocese is not a party to the *O'Connor Hospital* litigation, it, like many religious organizations, is impacted by the decision. On behalf of the Archdiocese, we respectfully request the Court to reconsider its decertification order and to republish the *O'Connor Hospital* opinion pursuant to California Rule of Court 978.

As the *O'Connor Hospital* opinion was certified by the Sixth District, Court of Appeal, it meets the standards for publication set forth in Rule 976(b). See Rule 976(c)(1). And, the Archdiocese submits that *O'Connor Hospital* also satisfies the criteria of Rule 976(b).

The *O'Connor Hospital* opinion addresses significant legal issues which directly affect all religious organizations especially those, like the Archdiocese, that operate and/or sponsor schools and hospitals, in addition to church facilities. As the general type of factual situation in *O'Connor Hospital* will doubtless occur again, the opinion provides sorely needed guidance to religious organizations and certain of their employees that will greatly aid in evaluating employment-related decisions. Given the paucity of case law analyzing the

specialized area of "wrongful" termination in the context of a religious setting, *O'Connor Hospital* is invaluable. As a result of *O'Connor Hospital* both the institutions and their employees will have a much better understanding of their respective rights and obligations.

Lastly, republication of the opinion would assist the lower courts in addressing the issues discussed in *O'Connor Hospital* and would thereby promote increased efficiency and consistency within the court system.

Accordingly, the Archdiocese urges the Supreme Court to permit republication of the *O'Connor Hospital* opinion or, alternatively, proposes that the Court seriously consider whether the opinion is suitable for partial publication pursuant to California Rule of Court 976.1.

Sincerely,

Kenneth Klein
of RIORDAN & McKINZIE

cc: Phillip J. Griego, Esq.
Attorney for Real Party in Interest

Stephen W. Parrish, Esq.
Weissburg and Aronson
Attorneys for Petitioner O'Connor Hospital

Clerk of the Superior Court
County of Santa Clara

January 5, 1988

The Honorable Chief Justice
and Associate Justices
Supreme Court of the State of California
455 Golden Gate Avenue
Room 4250
San Francisco, California

Re: O'CONNOR HOSPITAL, Petitioner v. SUPERIOR COURT OF THE COUNTY OF SANTA CLARA, Respondent; CLEU, Real Party in Interest.
No. S003187 [6th District, No. H0032211

Honorable Justices:

On December 23, 1987, the Supreme Court denied the petition for review of Real Party in Interest in the above- referenced cause, and also directed the Reporter of Decisions not to publish in the Official Appellate Reports the opinion of the Court of Appeal filed October 14, 1987, which appears at 195 Cal.App.3d 546. (Cal. Const., Art. VI, section 14; Rule 976, Cal. Rules of Court.)

In the absence of any procedure specified in Rule 976, petitioner, O'Connor Hospital, respectfully requests that the Supreme Court reconsider its order that the decision of the Court of Appeal not be published. We submit that the opinion meets the criteria of both subparts (3) and (4) of subdivision (b) of Rule 976, California Rules of Court.

The opinion clearly involves a legal issue of continuing public interest. (Rule 976(b)(3), Cal. Rules of Court.) This office represents O'Connor Hospital, which is sponsored by a religious order of the Catholic Church, the Daughters of Charity of Saint Vincent de Paul. We also represent other facilities sponsored by religious organizations. Since the opinion was first published, we have been contacted by other counsel, both in California and from other jurisdictions, who have expressed considerable interest in the opinion in their

capacities as counsel for religiously sponsored employers. We are all able to agree that all parties, both plaintiff and defendant, have been disadvantaged by the relatively few opinions concerning the First Amendment guarantee of religious liberty in the context of wrongful termination litigation brought by members of the clergy and other religious persons. As more members of the clergy bring "employment" disputes before the courts for resolution, the issues discussed in the O'Connor Hospital decision will undoubtedly come before civil and appellate courts again.

Moreover, the opinion makes a significant contribution to the legal discourse on the subject of the relationship between the First Amendment and religiously sponsored institutions. (Rule 976(b)(4), Cal. Rules of Court.) Although there are certain aspects of the Court of Appeal opinion with which the Supreme Court might disagree, the opinion nonetheless sets forth a clear, historical analysis of the issues presented, and provides an important statement on an issue which will continue to develop. The opinion has also been the subject of several articles in both legal and religious periodicals and newspapers. Publication of the opinion of the Court of Appeal below will, we believe, assist trial courts and legal literature in developing the conceptual basis of this area of constitutional law, for which there are presently few cases, until such time as the Supreme Court is provided the opportunity to do so. Publication would not, however, be deemed an expression of opinion by the Supreme Court of the correctness of the law set forth in the opinion. (Rule 978(c), Cal. Rules of Court.)

Very truly yours,

Gregory W. McClune

Stephen W. Parrish

SWP:pmi

cc: Phillip J. Griego, Esq.

Attorney for Real Party in Interest

Clerk of the Superior Court
County of Santa Clara

Clerk of the Court of Appeal
Sixth Appellate District

GREGORY W. McCLUNE
STEPHEN W. PARRISH
WEISSBURG AND ARONSON, INC.
Attorneys at Law
555 California Street
Suite 2400
San Francisco, CA 94104
Telephone: (415) 434-4484

Attorneys for Defendant
O'CONNOR HOSPITAL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

PAUL E. CLEU, Case No. 609434

Plaintiff, ORDER OF DISMISSAL

v.

O'CONNOR HOSPITAL,
a California Corporation,
Does I through X, inclusive,

Defendant.
_____/

It appearing to the satisfaction of this Court that on January 7, 1988, a Peremptory Writ of Prohibition was issued by the Court of Appeal of the State of California, Sixth Appellate District, directed to this Court and commanding that this Court take no further action other than dismissal and;

Good cause appearing therefore,

IT IS HEREBY ORDERED that the above-entitled action, be, and it hereby is, dismissed, and that defendant recover its costs in this proceeding.

DATED: FEB. 9 1988

CONRAD L. RUSHING

Judge of the Superior Court